VIJAYALAKSHMI DEVI NADCHATIRAM

v.

DANAPAKIA DEVI NADCHATIRAM & ANOR

COURT OF APPEAL, KUALA LUMPUR
SITI NORMA YAAKOB JCA
MAHADEV SHANKAR JCA
DENIS ONG JCA
[CIVIL APPEAL NO: N-02-483-1995]
20 NOVEMBER 1997

LAND LAW: *Caveat - Removal of caveat - Issues of fraud and breach of trust - Whether there was a serious question to be tried*

This was an appeal against an order directing the removal of a caveat filed by the appellant.

In 1992, the appellant had commenced misfeasance proceedings against the 2nd respondent for fraud and breach of trust in the manner he dealt with and disposed of the company's assets. In her statement of claim, the appellant stated that the 2nd respondent and another director executed a memorandum of charge in favour of Central Malaysian Finance Berhad ('CMF') as security for a loan of RM350,000 in respect of property belonging to the company. The said loan was purportedly obtained for the personal benefit of the 2nd respondent to purchase in his and his nominee's name a piece of land in Seremban ('Lot 2910') from Fraser & Neave (M) Sdn Bhd ('F&N') which was subdivided into four separate lots. The 2nd respondent in his defence, claimed that the entire money was used for the business of the company.

On 26 January 1994, the appellant lodged a caveat against the four titles on the ground that the registered owner of the land was a constructive trustee for Nadchadtiram Realties (1960) Sdn Bhd (in liquidation). In response, the respondents filed a motion requiring the appellant to show cause why the caveat should not be removed. Various affidavits in opposition were filed. The issue was whether the respondents had utilised the funds of the company to acquire the grant of Lot 2901. According to the appellant's affidavit, it was clear from the accounts that the respondents had concealed the charge and loan transaction from the accountant and had thus committed fraud by deceiving the accountant. In reply, the respondents claimed that the loan was taken for a joint venture project between the company and one Hj Mohd Nor So'od who was the recipient of the loan. But the respondents were unable to produce

proof of payment to Hj Mohd Nor So'od when questioned by the court. Notwithstanding, the High Court held that the appellant had failed to prove her case and ordered the removal of the caveat.

The sole issue before the Court of Appeal was whether there was a serious question to be tried.

Held:
Per Mahadev Shankar JCA

[1] The 2nd respondent's averment in his defence that he took the money and spent it in the business of the company contradicted that in his affidavit where he said that the money was given to Hj Mohd Nor So'od. In the absence of conclusive proof from the respondents on how they got the money to pay for the first two instalments for Lot 2901 and what they did with the CMF moneys whilst they were having obvious problems in paying the balance due to F&N, it must be held that the respondents had not given a proper account.

[2] Upon the materials before him it was not really open to the judge to come to a finding of facts. He misdirected himself by holding on no evidence at all that the appellant had failed to prove her case when all that was required was to show that there was a serious question to be tried.

[3] The court allowed the appeal and ordered that the originating summons filed in the court below be dismissed and the caveat filed be restored. The respondents to pay the appellant her costs here and below.

[Appeal allowed with costs.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Ini adalah rayuan terhadap perintah mengarahkan pengeluaran kaveat yang difailkan oleh perayu.

Pada tahum 1992, perayu telah memulakan prosiding "misfeasance" terhadap responden kedua untuk fraud dan pecah amanah dalam cara beliau mengendalikan dan menjual aset-aset syarikat. Di dalam penyata tuntutannya, perayu telah menyatakan bahawa responden kedua dan pengarah yang lain telah menandatangani satu memorandum gadaian untuk kepentingan Central Malaysian Finance Berhad (CMF) sebagai sekuriti untuk mendapatkan pinjaman sebanyak RM350,000 berkenaan sebidang tanah yang dimiliki oleh syarikat tersebut. Pinjaman itu dikatakan diperolehi untuk kepentingan persendirian responden kedua iaitu untuk membeli sebidang tanah di Seremban, Lot 2901, atas namanya dan nama nomimeenya dari Fraser & Neave (M) Sdn Bhd

(F & N) yang mana dibahagikan kepada empat lot yang berasingan. Responden kedua di dalam pembelaannya menegaskan bahawa wang tersebut digunakan untuk perniagaan syarikat.

Pada 26 Januari 1994, perayu telah meletakkan satu kaveat ke atas empat suratan hakmilik tersebut atas alasan bahawa pemilik berdaftar tanah tersebut adalah pemegang amanah konstruktif untuk Nadchadtiram Realties (1960) Sdn Bhd (di dalam liquidasi). Sebagai balasan, responden telah memfailkan satu notis usul mengkehendaki perayu menunjuk sebab kenapa kaveat tidak patut dikeluarkan. Beberapa afidavit tentangan telah difailkan. Isunya adalah samada responden telah menggunakan wang syarikat untuk mendapatkan pemilikan Lot 2901. Mengikut afidavit perayu, adalah jelas dari akaun bahawa responden telah menyembunyikan transaksi gadaian dan pinjaman dari akauntan dan dengan itu telah melakukan fraud dengan menipu akauntan tersebut. Di dalam balasannya, responden menyatakan bahawa pinjaman tersebut telah dipakai untuk projek joint venture di antara syarikat dengan Haji Mohd Nor bin So'od yang mana merupakan penerima pinjaman tersebut. Tetapi responden tidak dapat menunjukkan bukti bayaran kepada Haji Mohd Nor apabila disoal oleh mahkamah. Walaubagaimanapun, Mahkamah Tinggi telah memutuskan bahawa perayu gagal untuk membuktikan kesnya dan telah memerintahkan kaveat dikeluarkan.

Isu yang di hadapan Mahkamah Rayuan adalah samada terdapat soalan yang penting untuk dibicarakan.

Diputuskan:
Oleh Mahadev Shankar HMR

[1] Pengataan responden kedua di dalam pembelaannya bahawa beliau telah mengambil wang tersebut dan memakainya untuk perniagaan syarikat adalah bertentangan dengan afidavitnya di mana dia berkata wang tersebut diberi kepada Haji Mohd Nor. Dalam ketiadaan bukti kukuh dari responden bagaimana mereka memperolehi wang untuk membuat bayaran ansuran pertama dan kedua untuk Lot 2901 dan apa yang mereka lakukan dengan wang CMF sementara mereka menghadapi masalah membayar baki yang kena dibayar kepada F & N, mesti diputuskan bahawa responden gagal untuk memberi akaun yang berpatutan.

[2] Dengan keterangan yang dihadapannya, hakim tidak patut membuat satu keputusan berdasarkan fakta. Beliau telah salah arahkan dirinya dengan membuat keputusan atas ketiadaan keterangan sama sekali bahawa perayu telah gagal membuktikan kesnya apabila apa yang perlu hanya untuk menunjukkan terdapat soalan yang penting untuk dibicarakan.

[3] Mahkamah membenarkan rayuan ini dan memerintah supaya saman pemula yang difailkan di mahkamah bawah ditolak dan kaveat yang difailkan dikembalikan. Responden dikehendaki membayar kos perayu di sini dan di bawah.

[Rayuan dibenarkan dengan kos.]

Cases referred to:
Kho Ah Soon v. Duniaga Sdn Bhd [1996] 2 CLJ 218 ***(cit)***
Kumpulan Sua Betong Sdn Bhd v. Dataran Segar Sdn Bhd [1992] 1 CLJ 20 ***(cit)***
Lam Soon Cannery Co v. Hooper & Co [1965] 2 MLJ 148 ***(refd)***
Peninsular and Oriental Steam Navigation Co v. Johnson [1938] 60 CLR 189 ***(refd)***
Permanent Trustee Australia Ltd v. Shand [1991-92] 27 NS WLR 426 ***(foll)***
Shardy v. Tkacz [1991] 1 NZLR 310 ***(foll)***

Legislation referred to:
Companies Act 1965, s. 305

For the appellant - RR Sethu (Satharuban Sivasubramaniam with him); M/s Satha & Co
For the respondents - Christopher Fernando (Haresh Mahadevan with him); M/s Aris Rizal Christopher Fernando & Co

[Appeal from High Court, Seremban; Originating Summons No: 24-149-95]

Reported by Cindy Chan

JUDGMENT

Mahadev Shankar JCA:

Before the appeal proper was heard, respondents' counsel sought to put in new evidence. The application so dismally failed to meet the test in *Ladd v. Marshall* that we dismissed it with costs. (See *Lam Soon Cannery Co. v. Hooper & Co.* [1965] 2 MLJ 148. We do not think the factual basis of that application merits any judicial analysis.

The appeal proper is against an order directing the removal of a caveat filed by the appellant. This dispute between the parties is but another chapter in the litigation between members of the Nadchatiram family which has infested our courts.

The caveat was lodged by the appellant on 26 January 1994 against four titles for the land comprised therein in the town of Seremban (the said titles) 2nd Volume Appeal Record p. 275. The ground stated was that the registered owner of the said land was a constructive trustee of the said lands for Nadchatiram Realities (1960) Sdn. Bhd. (in liquidation) of which the appellant

is a contributory and further that the appellant had been given the leave of the court to commence an action against the registered owners for a transfer of the said land by the registered owners of the company.

In 1992 the appellant had commenced misfeasance proceedings against Jegadevan Nadchatiram (Jega) under Seremban High Court Originating Summons No. 23-246-92 (the misfeasance proceedings). These proceedings were commenced under s. 305 of the Companies Act 1965. The subject matter of the exercise was the assets of Nadchatiram Realities (1960) Sdn. Bhd. (hereafter referred to as the company). From the beginning of 1975 till the company was ordered to be wound-up on 5 September 1989, Jega was a director of the company. In the statement of claim dated 24 December 1992 the appellant made very serious allegations against Jega. In effect he was accused of fraudulent conduct by way of breach of trust in the manner he dealt with and disposal of much of the company's assets. We are now here concerned only with the said four titles, and do not propose to talk about the other accusations now. The first respondent Danapakia Devi (Dana) was at all material times the secretary of the company with a liability for the company's assets which was co-extensive with that of Jega.

In para. 7(a) of the statement of claim 2nd Volume Appeal Record p. 317 the appellant pleaded:

> 7. Whilst the defendant was one of the directors of the said company, the defendant as a director committed by making, authorising, sanctioning or participating the following acts of misfeasance and/or breach of trust and/or duty in relation to the company:
>
> (a) On the 18 March 1975 the defendant and another director executed a Memorandum of Charge in favour of Central Malaysian Finance Berhad as security for obtaining a loan for the sum of $350,000.00 in respect of a piece of land belonging to the said company and held under H.S.(D) 3933 for Lot No: 3682. The said loan of $350,000.00 was obtained solely for the benefit of the defendant and the said loan was converted for personal use of the defendant to purchase in his name and his nominee a piece of land held under Grant for Land No: 10799 for Lot No: 2901 in the Town of Seremban which is now subdivided into four (4) separate lots held under Title No: H.S.(D) 11566 for Lot No: 13497, H.S.(D) 11567 for Lot No: 13498 and H.S.(D) 11568 for Lot No: 13499 all in the Town and District of Seremban in which titles to the land are still registered in the name of the defendant and his nominees, Danapakia Devi d/o of Nadchatiram.

On 5 January 1993 Jega filed a statement of defence in which he responded 2nd Vol. Appeal Record p. 354:

> 7. Save that the defendant was one of the directors of the company the rest of the allegations contained in para. 7 are denied.
>
> (a) As to subpara (a) of Para 7, the Defendant will contend that the loan was taken in the name of the Defendant by reason of the refusal of the financial institution to lend money to the company. No part of the loan money was used by the Defendant for his personal benefit and the entire money was used for the business of the company. The property held under Grant No 10799 was purchased by the Defendant partly with his own money and partly financed by the loan granted by the Great Eastern Life Assurance Co. Ltd. on the security of the property purchased. Save that the facts admitted therein the rest of the allegations contained in subpara (a) are denied.

The misfeasance proceedings are yet to be heard. Full discovery has not yet been given by the defendant. As the appeal records show the appellant's attempts to get the misfeasance proceedings to trial have been resisted by Jega at every turn. Besides the liquidator's involvement in the company required the appellant to get the liquidator's concurrence to whatever actions she contemplated involving the company. We do not need to get into all this now. Suffice to say that on 24 January 1994 the appellant obtained an order in Companies Winding-up No. 42-2-88 2nd volume Appeal Record p. 280 that she be permitted to add the name of the company as a co-plaintiff in the misfeasance proceedings and to take such steps as she may be advised for the recovery of the company's properties Jega had improperly dealt with or disposed. The said caveat was only lodged against the said four titles after order was made and in furtherance of it.

Jega and Dana filed a motion (24-149-95) on 1 April 1995 requiring the appellant to show cause why the caveat should be removed.

Contentious affidavits were filed. There was no cross-examination. What was in issue was whether Jega and Dana had utilised the funds of the company to acquire the Grant 10799 for Lot 2901 which subsequently were sub-divided into the four titles.

Para 7 of the appellant's affidavit affirmed on 20 April 1995, to show cause why the caveats should remain, reads 1st Volume Appeal Record p. 116-119:

7.1 On the 18th March 1975, the plaintiffs as officers of Nadchatiram Realities (1960) Sdn. Bhd. (In Liquidation) executed a Memorandum of Charge in favour of Central Malaysian Finance Berhad for the loan of M$350,000-00 on the security of the land of the said Company held under H.S.(D) 3933 in the Mukim of Rasah. A copy of the Charge executed by the plaintiffs is now produced, annexed hereto and marked as as exhibit "V.4".

7.2 By the said Charge, the plaintiffs as officers of the Company acknowledged receipt of the sum of M$350,000-00 upon execution of the said Charge. In this connection, I crave leave to refer to the charge.

7.3 The said charge was discharged on the 25th September 1980, vide Discharge of Charge Pres. No: 6959-80. I crave leave to refer to the endorsement on the Charge.

7.4 I now produce and annex hereto and marked as exhibit "V.5" photostat copies of the certified copies of the audited Balance Sheet and Profit and Loss Account of Nadchatiram Realities (1960) Sdn. Bhd. submitted by the plaintiffs for the years 1974, 1975, 1977, 1978 and 1979 to the Registrar of Companies. I am advised by my solicitors and verily believe that the same Balance Sheets and Profit and Loss Accounts were also submitted to the Inland Revenue Department.

7.5 The plaintiffs did not submit the Balance Sheet and Profit and Loss Account after 1979.

7.6 From the accounts, the plaintiffs had concealed to the accountant the above-mentioned Charge transaction executed by the plaintiffs on the 18th March 1975 whereby a loan of M$350,000-00 was obtained. In one of the allegations of fraud in the misfeasance action is that the plaintiffs had committed fraud by deceiving the accountant. I am advised by my solicitors and verily believe that should the loan secured from the said Charge was for the use of the Company, the aforesaid loan would have been reflected in the accounts of the company.

7.7 Further, the evidence establishing the plaintiffs' misfeasance, breach of trust, unlawful transfer of properties, misappropriation and conversion of monies would be produced by calling the Liquidator of Nadchatiram Realities (1960) Sdn. Bhd. [In liquidation] and other witnesses to testify at the trial of the misfeasance action, vide Seremban High Court Originating Summons No.: 24-346-92. Upon winding-up of the Company, the Liquidator would take control of the Company and would also take possession and custody of all documents of the Company including bank statements and other necessary documents. By the Order of the High Court, Seremban dated 24th January 1994 made in the Winding-up proceedings, vide Seremban High Court Co. (Winding-up) No: 28-2-88,

the Liquidator is to retain and preserve all documents now in the custody of the Liquidator pending the final disposal of the misfeasance action and the Seremban High Court Civil Suit No: 22-95-93. A copy of the Order is now produced, annexed hereto and marked "V.6".

7.8 Having regard to the fact that the misfeasance action brought by me as a contributory of the Company and the documents of the Company are not in my custody, I am unable to produce at this stage, copies of the bank statements and other documents as these documents by law are with the liquidator. Having regard to the Order of the Court dated 24th January 1994 marked as exhibit "V.6" above, the only way I could establish the plaintiffs' misfeasance is by calling witnesses to testify and produce documents at the trial of the misfeasance action.

7.9 I am advised by my solicitors and verily believe that having regard to the peculiar nature of the misfeasance claim, vide Seremban High Court Originating Summons No: 24-346-92, which misfeasance action is yet to be heard, any issue or part the issue arising thereon should not be heard and decided in this action. If the court was to do so, I would not only be denied a fair trial as at this state I am unable to produce documents other than by calling witnesses but also greatly prejudiced, particularly by the plaintiffs' contention in paragraph 16 of the joint-affidavit of the plaintiffs affirmed on 1st April 1995 that they have not committed misfeasance or fraud as alleged in the misfeasance action, vide Originating Summons No: 24-346-92.

7.10 The plaintiffs are constructive trustees as the said lands were purchased out of the loan of $350,000.00 granted by the Central Malaysian Finance Berhad upon the security.

7.11 The plaintiffs had also committed other several acts of misfeasance, particulars of which are set out in details in the misfeasance action. The plaintiffs by the said misfeasance action had virtually treated the Company as their own and transferred funds from the Company to second plaintiff.

In their reply affidavit affirmed on 4 May 1995, Jega and Dana stated as follows 1st Appeal Record p. 149:

13. Paragraph 7.1 of the Defendant's Affidavit is admitted. The Plaintiffs deny paragraph 7.2 and will contend that the said charge was a Third Party charge and the loan pursuant to the charge was released to the Borrower namely HAJI MOHD NOR BIN HAJI SO'OD. A copy of the relevant charge together with the annexure thereto (Loan Agreement) is produced herein and marked as Exhibit 'DJ 5'. This loan was taken for a joint venture project i.e. replanting the Company's 200 acres of oil palm and to plant cash crops on a profit sharing basis with the Company. A copy of the Joint Venture Agreement dated 10th February, 1975 between the Company and the said HAJI MOHD NOR BIN SO'OD is produced herein as Exhibit marked 'DJ 6'. The document produced

herein and marked as Exhibit 'DJ 7' contains photocopies of the official receipts issued by the Central Malaysian Finance Bhd to the said HAJI MOHD NOR BIN HAJI SO'OD acknowledging the receipts of the repayment of the loan.

We agree with the appellant's counsel that these two averments are contradictory. In the defence Jega was saying he took the money and spent it in the business of the company. In his affidavit he is saying the money was given to Haji Mohd. Noor bin Haji So'od which flatly contradicts the defence. The key issue here is that no documents had been produced by Jega and Dana to show what was done with the RM350,000. Datin Saraswathy Devi was counsel for Jega and Dana. When the trial Judge asked her in the Court below for proof of payment to Haji Mohd. Noor, she admitted there was none.

The relevant portion of the trial Court record reads 1st Appeal Record p. 32-33:

Peguam Plaintif: The company's property "Rasah Land" was charged to Central Malaysian Finance on 18.3.75 for a loan of RM350,000/-. This is a 3rd party charge in favour Hj. Mohd. Noor. The RM350,000/- was paid to Hj. Mohd. Noor pursuant to a joint-venture agreement. See "DJ6" in enclosure 9.

Court: Where is the proof of payment of RM350,000/- to Hj. Mohd. Noor?

Answer: No proof of payment but it is presumed that RM350,000/ was paid to Hj. Mohd. Noor because he repaid various sums of money to Central Malaysia Finance.

See exhibit "DH-7" in Lampiran 9.

This is a 3rd party charge in favour of Hj. Mohd. Noor who has to repay the loan @ RM3791.66 p.m.

See annexure to charge of Rasah property i.e. "DJ-5" of Lampiran 9.

The RM350,000/- from the charge of Rasah land was not used by Plaintiff to buy the F & N property.

This is but a bare assertion. The relevant evidence was peculiarly within the knowledge of Jega and Dana and they could have been a lot more forthcoming.

Jega as a director and Dana as secretary of the company, and trustees of its assets, had a very heavy onus upon them to show what was done with the company's money. In *Peninsular and Oriental Steam Navigation Co. v. Johnson* [1938] 60 CLR 189 @ p. 218 Latham CJ said:

> But in the exercise of his powers he is a trustee for the company and is in a fiduciary relation to the company (*Imperial Mercantile Credit Association v. Coleman* [1973] LR 6 HL at p. 204). If in fact he does have control of property of the company, he is a trustee of that property and must account to the company for it (*Flitcroft's* Case [1882] 21 Ch. D 519). When an account is claimed, each case must be considered in relation to all its circumstances: "it would be endless to point out all the several avenues in human affairs, and in this commercial age, which lead to or end in accounts". (*Blackstone's Commentaries,* Book III., c. 27, p. 437). This statement is even more applicable in the twentieth century than in the eighteenth century. Any person who, as agent or manager or director, has in fact the disposition or control of the moneys or other property of another person is a person who may be ordered to bring in an account.

The appellant's contention was that the RM350,000 obtained by Jega from Central Malaysian Finance (CMF) around or after 21 March 1975 was used to buy the Grant 10799 for Lot 2901. In para. 7.11 the appellant had also made a general allegation that Jega and Dana had treated the company's funds as their own. Putting aside Jega's failure to show this charge and the loan obtained in the company's audited accounts and the contradiction as to whether he received this money (as stated in his defence) or Haji Mohd. Noor got it from CMF on a third party charge, the fact remains that Jega and Dana have produced no concrete evidence whatsoever to show –

(i) who received this money;

(ii) what was done with it; and

(iii) where they got the money to pay for the first two instalments and redeem the charge.

Jega's case is that he bought Lot 2901 with his own moneys and a loan from Great Eastern Life (Great Eastern). His counsel submits that the chronological sequence conclusively proves that the CMF moneys could not have been used to buy Lot 201. This evidence is as follows:

6 February 1975	–	Jega and Dana enter into written agreement with Fraser & Neave (M) Sdn. Bhd. (F & N) to buy Lot 2901. 2nd Appeal Record p. 207. Purchase price RM345,384 payable RM86,346 on execution and RM86,346 on or before 6 March 1975 with the balance of RM172,692 payable on or before 6 May 1975.
		(But no direct evidence as to where Jega and Dana got the money to pay the first and second instalments).
6 March 1975	–	First instalment due for RM86,346.
18 March 1975	–	Jega and Dana excute charge for Lot 3682 to CMF for RM350,000 2nd Appeal Record p. 407.
21 March 1975	–	Charge presented to Land Office for registration. (No documentation as to when RM350,000 received and to whom paid.)
6 May 1975	–	Final payment of RM172,692 due.
27 May 1975	–	Great Eastern releases RM175,000 to Allen & Gledhill (see letter 9 June 1975). 2nd Appeal Record p. 260.
2 July 1975	–	Jega and Dana execute charge in favour of Great Eastern for Lot 2901 for RM175,000. But the Loan Agreement annexed to the charge states that the interest of the loan was to commence from 27 May 1975. 2nd Appeal Record p. 223 cl. (v).

The memorials made by the Land Office on the document of title are shown at second Appeal Record p. 545. The registration of the transfer of Lot 2901 and the charge by Jega and Dana to the Great Eastern Life was purportedly registered on 21 July 1975 but this was cancelled. The transfer and charge was subsequently registered on 3 September 1975. Counsel for the respondents was unable to explain the signifance of these entries to us.

Until clarification at the trial in the pending Civil Suit, the inference is open that the payments due on the Sale & Purchase Agreement for Lot 2901 were not made on the dates stated in the agreement but at other times. Allen & Gledhill were acting for the vendors and for Great Eastern. Jega and Dana entered into negotiations to raise money at or about the same time they charged the company's land to CMF for RM350,000. Whether any part of this money was used to put through the purchase of Lot 2901 in the meantime is an open

question. It is to be noted that the Sale & Purchase Agreement with F & N provided for forfeiture and time was of the essence of the contract. But the sale was not concluded on 6 May 1975 but on 3 September 1975. So the dates in the Sale & Purchase Agreement seem to be very flexible. Even the intermediate use of the company's funds to buy time while the charge to grant Great Eastern was being put through would be enough to ground the cause of action.

In the absence of conclusive proof from Jega and Dana on how they got the money to pay for the first two instalments for Lot 2901 and what they did with the CMF moneys whilst they were having obvious problems in paying the balance due to F & N it must be held that Jega and Dana have not given a proper account. Paragraph 7.11 of the appellant's affidavit was a very wide allegation which was not confined to the CMF moneys and therefore caught the first two instalments as well. Any secret advantage made by trustees out of the use of trust funds must accrue to the beneficiary i.e. the company. No receipts were produced from Haji Mohd. Noor.

In *Permanent Trustee Australia Ltd. v. Shand* [1991-92] 27 NS WLR 426 at p. 429 Young J said:

> It is now clear that this means that the court may extend a caveat not only where it sees that the caveator has established a prima facie case that it has an interest in the land, but also where the court considers that the caveator may well show such a case after it has had the opportunity of discovery and inspection and interrogatories, particularly where the caveator's position will be irretrievable after the registration of a competing deal: see *Penny Nominees Pty Ltd v. Fountain* (Young J, 2 May 1989, unreported) and *Rutledge v. Jaluit Pty Ltd* (Hodgson J, 31 October 1991, unreported).

The only issue with which a court is concerned in deciding whether a caveat should remain is whether there is a serious issue to be tried. It should not go further and with finality decide the issues in the Civil Suit which are pending trial. (See *Kumpulan Sua Betong Sdn. Bhd. v. Dataran Segar Sdn. Bhd.* [1992] at pp. 267, 270 and 272. Also *Kho Ah Soon v. Duniaga Sdn. Bhd.* [1996] 1 AMR 977 at p. 980.

And again in *Shardy v. Tkacz* [1991] 1 NZLR 310 at 313 Hardie Boys J said:

> The same is true of the circumstances surrounding the signing of the documents and the obvious changes of date. These are all matters appropriate for the substantive hearing and quite unsuitable for resolution at this interlocutory stage. There is plainly sufficient evidentiary material to sustain the order that the caveat not lapse, at least in the face of a mortgage which is no more than a device to test the issue.

On the kind of material before him it was not really open to the Judge to come to findings of fact. He misdirected himself by holding on no evidence at all that the appellant had failed to prove her case when all that was required was to show that there was a serious question to be tried.

We therefore allowed this appeal and ordered that the Originating Summons filed in the court below be dismissed and the caveat filed be restored. The respondents must pay the appellant her costs here and in the court below. The appellant's deposit shall be refunded to her.